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IN THE

Supreme Court of the United States

October Term 1969
No. 1544

MELVIN LEE HOYT AND JOSEPH S. LEE,
Petitioners,

vs.

STATE OF MINNESOTA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR RESPONDENT IN OPPOSITION

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Respondent prays that the petition for writ of certiorari to the Supreme Court of the State of Minnesota in the above entitled matter be denied and respectfully shows to the court:

OPINIONS BELOW

The opinion of the Supreme Court for the State of Minnesota is reported at 174 N.W. 2d 700.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether the convictions under Minnesota Statutes, Section 617.241, which prohibits the sale or distribution of obscene material, violate petitioners' rights under the First and Fourteenth Amendments to the United States Constitution.

2. Whether proper tests were utilized in determining the character of the books to be obscene.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The pertinent provisions of the First and Fourteenth Amendments to the United States Constitution and the Minnesota Statute involved are set forth in the Petition at pp. 3-5.

2. The pertinent provisions of the Supreme Court Rules (28 USC Rule 19) provides as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

STATEMENT OF THE CASE

This litigation comes before the court from an opinion rendered by the Supreme Court of the State of Minnesota affirming convictions for the sale of obscene books by clerks employed at the Wabasha Book Store in the City of Saint Paul.

1. Case of Melvin L. Hoyt

On April 11, 1967, Sergeant Robert Kunz, working out of the Vice Unit of the Saint Paul Police Department, entered a book store at 23 West Seventh Street in the City of Saint Paul. He had a brief conversation with the clerk whom he identified as the petitioner, Melvin L. Hoyt. Mr. Hoyt showed Sergeant Kunz a girly magazine and sold him a paperback book.

On July 3, 1967, Sergeant Kunz entered the Wabasha Book Store at 480 Wabasha Street in the City of Saint Paul where petitioner Hoyt was employed as a clerk. The officer examined the store and described the premises as having bookracks on three walls with two additional racks in the center. Photographs of the store were submitted as State's Exhibits A-J. The officer stated all the photographs and books he observed pertained to nudity and sex. On this occasion petitioner Hoyt showed Sergeant Kunz a magazine exhibiting male genitalia and sold him a book and a packet of photographs R. p. 7).

On July 5, 1967, Sergeant Kunz returned to the Wabasha Book Store accompanied by Sergeant Edward E. Fitzgerald of the Saint Paul Police Department. Sergeant Fitzgerald testified that he observed the magazines and books on the racks. He described the materials as paperback books dealing with sex relations and photographs of nudes of both sexes in various poses (R. p. 14).

On August 31, 1967, Sergeant Fitzgerald returned to the the book store alone. Upon entering he found petitioner Hoyt and a few customers in the store. He selected four books which he purchased from petitioner Hoyt. Three of the books; *The Way of a Man With a Maid, Adam and Eve,* and *Business as Usual,* are the subject matter of this litigation. (State's Exhibits K, M and N).

On September 1, 1967, complaint was made against petitioner Hoyt under Minnesota Statutes 617.241. The matter came on for trial before the Honorable Stephen L. Maxwell, Judge of Municipal Court, City of Saint Paul on November 14, 1967. Petitioner and his counsel waived the right to a jury and the trial was had before the court (R. p. 3). After hearing testimony the court recessed to read the State's Exhibits and make determinations as the finder of fact. On November 21, 1967, the court having read State's Exhibits K, M and N, found petitioner Melvin L. Hoyt guilty and imposed a general sentence of $100 fine.

2. Case of Joseph S. Lee

The case of petitioner Lee is similar to that of petitioner Hoyt set forth above. On January 8, 1968, Officer Jerrell L. Navara, working out of the Vice Unit of the Saint Paul Police Department, entered the Wabasha Book Store where Joseph Lee was employed as a clerk. Officer Navara gave a similar physical description of the premises testifying that all the books and photographs he observed pertained to nudity and sexual matter (R. p. 5). After looking around the store for a short period of time the officer selected two books for purchase. He advanced to the front counter and presented the books, *Lady Susan's Cruel Lover* and *True Love Stories of*

Growing Up, to petitioner Lee who made the sale (R. p. 11). Officer Navara left the store after making the purchase.

Complaint was again brought under Minnesota Statutes 617.241 and the matter came on for trial before the Honorable Stephen L. Maxwell, Judge of Municipal Court, City of Saint Paul, on May 7, 1968. The petitioner Lee waived a jury through his counsel and the case was tried to the court (R. p. 3). Petitioner offered certain exhibits purchased by his counsel on local bookstands. Objection to these items was sustained (R. p. 28). After receiving testimony the court recessed to read the State's Exhibits and make determinations of fact. On May 15, 1968, the court found petitioner Lee guilty as charged and imposed a general sentence of $100 fine.

ARGUMENT

I

The Supreme Court of the State of Minnesota Has Not Decided a Federal Question in a Way Not in Accord With Applicable Decisions of This Court.

Petitioners were convicted under a state statute aimed only at material obscene in character. This court in *Roth v. United States*, 354 US 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498, dwelt at length on the subject of freedom of speech in relation to obscenity and concluded it is not within the area of constitutionally protected speech or press. The findings of the trial court and the independent appellate review conclude that under tests proposed by this court the material in question is obscene. As a result petitioners' rights under the First and Fourteenth Amendments were not violated since the sales that

are the subject of this litigation are not constitutionally protected. *Winters v. New York,* 333 US 507, 68 S. Ct. 665, 92 L. Ed. 840; *Kingsley Books Inc. v. Brown,* 354 US 436, 77 S. Ct. 1325, 1 L. Ed. 2d 1469; *Adams Newark Theatre Co. v. Newark,* 354 US 931, 77 S. Ct. 1395, 1 L. Ed. 2d 1533; *Ginzburg v. United States,* 383 US 463, 86 S. Ct. 942, 16 L. Ed. 2d 31.

Petitioner Lee alleges a violation of his rights occurred when the trial court failed to receive certain books offered by him into evidence. We submit the proferred evidence was properly excluded as being irrelevant to the issue of whether or not the books sold by the petitioner were obscene. A similar situation was presented in *People v. Finkelstein,* 183 N.E. 2d 661, cert. den. 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100. In holding the evidence properly excluded the court stated:

> "* * * The fact that certain other and different publications were *seen* in bookstores and on magazine stands in New York City is no indication that they were *sold,* or *read,* or that to the average person applying contemporary community standards (Roth v. United States, supra) they were not obscene." 183 N.E. 2d 661, at pp. 663-664.

While not unmindful of the observations by Justices Frankfurter and Harlan in *Smith v. People of State of California,* 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205, we feel the exclusion of the evidence in this case did not offend those views. It is not persuasive that one victory in spreading obscenity establishes community standards. We agree that petitioners might have submitted proper evidence of contemporary community standards but they offered none in this case and have

not been deprived of due process. *United States v. Oakley*, 290 F. 2d 517, cert. den. 368 U.S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 87, rehearing den. 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198. *Womack v. United States*, 294 F. 2d 204, cert. den. 365 U.S. 859, 81 S. Ct. 826, 5 L. Ed. 2d 822.

Petitioners further allege the necessity of additional evidence regarding the elements of obscenity is necessary to sustain the convictions. In its opinion, the Minnesota Supreme Court stated as follows:

> "In answer to the appellants' assertion that the convictions are unsupported by evidence bearing upon the social value of the books and their acceptance by community standards, we can only say that such evidence would add nothing. The material speaks for itself. If it is not obscene, the word has lost all meaning. We identify it for what it is and hold that it is obscene as a matter of law." 174 N.W. 2d 700 at p. 702.

While we can visualize instances where additional testimony would be helpful in determining whether the elements of obscenity are present, this court has not indicated that presentation of such evidence by the prosecution is a constitutional requirement. Rather, it has been said that the state retains broad powers to regulate obscenity and we submit such power includes the manner in which the court receives evidence. *Roth v. United States*, 354 US 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498; *Stanley v. Georgia*, 37 L.W. 4315. The present case involves no factual dispute relating to obscenity and the only issue is whether the material satisfies the statutory requirements and can be forbidden under the standards established by this court. This is a question of law upon which the lower court properly exercised its judgment.

II

The Supreme Court of the State of Minnesota Has Not Decided a Federal Question in a Way to Require an Exercise of This Court's Power of Supervision.

In considering the merits of petitioners' appeals the Supreme Court of the State of Minnesota stated the following:

> "From an examination of the material which is the subject of these prosecutions, we conclude that the convictions should be affirmed. In light of the case law, the dominant theme of the material appeals to the prurient interest of the average person and, applying contemporary community standards, is patently offensive and utterly without redeeming social importance." 174 NW 2d 700 at pp. 701-702.

In so affirming the court utilized a proper test in determining that the character of the books in question was obscene. *Roth v. United States*, 354 US 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498. *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.*, 383 US 413, 86 S. Ct. 975, 16 L. Ed. 2d 1. *Ginzburg v. United States*, 383 US 463, 86 S. Ct. 942, 16 L. Ed. 2d 31. *Redrup v. New York*, 386 US 767, 87 S. Ct. 1414, 18 L. Ed. 2d 515.

In addition the Minnesota Court retained its responsibility for rendering judgment upon the issue of constitutional infringement by making an independent review of the evidentiary basis on which the lower court findings were based. *Kahn v. United States*, 300 F. 2d 78, cert. den. 369 US 859, 82 S. Ct. 949, 8 L. Ed. 2d 18.

We submit that the decision of the lower court was correct in determining that the dominant theme of the material taken

as a whole appealed to a prurient interest in sex; that it was patently offensive because it affronted contemporary community standards relating to the description or representation of sexual matters; and that it was utterly without redeeming social value. *Roth v. New York, supra.* As a result there is no special or important reason for this court to review the matters before it on Writ of Certiorari.

CONCLUSION

WHEREFORE, Respondent respectfully prays that the petition for Writ of Certiorari to the Supreme Court of the State of Minnesota be denied.

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